

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FRANCISCA GARIBAY, o/b/o G.A.,
a minor child,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

NO: 12-CV-3040-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment, ECF Nos. 22 and 26. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. There being no reason to delay a decision, the hearing set for March 31, 2014, is vacated and this matter is submitted without oral argument.

1 Plaintiff, on behalf of G.A., a minor child, seeks judicial review of the
2 Commissioner's final decision denying G.A. Supplemental Security Income Child
3 Benefits under Title XVI.

4 JURISDICTION

5 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);
6 1383(c)(3).

7 STANDARD OF REVIEW

8 A district court's review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is
10 limited: the Commissioner's decision will be disturbed "only if it is not supported
11 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
12 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means
13 relevant evidence that "a reasonable mind might accept as adequate to support a
14 conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently,
15 substantial evidence equates to "more than a mere scintilla[,] but less than a
16 preponderance." *Id.* (quotation and citation omitted). In determining whether this
17 standard has been satisfied, a reviewing court must consider the entire record as a
18 whole rather than searching for supporting evidence in isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. If the evidence in the record "is

1 susceptible to more than one rational interpretation, [the court] must uphold the
2 ALJ's findings if they are supported by inferences reasonably drawn from the
3 record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district
4 court "may not reverse an ALJ's decision on account of an error that is harmless."
5 *Id.* at 1111. An error is harmless "where it is inconsequential to the [ALJ's]
6 ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted).
7 The party appealing the ALJ's decision generally bears the burden of establishing
8 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

9 **THREE-STEP PROCESS FOR CHILDHOOD DISABILITY**

10 To qualify for Title XVI (SSI) benefits, a child under the age of eighteen
11 must have "a medically determinable physical or mental impairment, which results
12 in marked and severe functional limitations, and which can be expected to result in
13 death or which has lasted or can be expected to last for a continuous period of not
14 less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(i). The Commissioner has
15 established a three-step sequential analysis to determine whether a claimant
16 satisfies the above criteria. 20 C.F.R. § 416.924(a). First, the Commissioner
17 considers whether the child is engaged in "substantial gainful activity." *Id.* at
18 § 416.924(b). Second, the ALJ considers whether the child has a "medically
19 determinable impairment that is severe," which is defined as an impairment that
20 causes "more than minimal functional limitations." *Id.* at § 416.924(c). Finally, if

1 the ALJ finds a severe impairment, he or she must then consider whether the
 2 impairment “medically equals” or, “functionally equals” a disability listed in the
 3 “Listing of Impairments.” *Id.* at § 416.924(c)-(d); *Id.* at § 404, Subpt. P, App. 1.

4 If a child's impairment or combination of impairments did not meet a listed
 5 impairment, there is an inquiry into a child's functioning in “six domains.” These
 6 six domains consider what the child can and cannot do in terms of:

- 7 (1) Acquiring and using information;
- 8 (2) Attending and completing tasks;
- 9 (3) Interacting and relating with others;
- 10 (4) Moving about and manipulating objects;
- 11 (5) Caring for [oneself]; and
- 12 (6) Health and physical well-being.

13 20 C.F.R. § 416.926a(b)(1)(i)-(vi). A child's impairment would be found
 14 functionally equal to a listed impairment if the child's condition resulted in a
 15 “marked” limitation in two of the domains, or an “extreme” limitation in one
 16 domain. 20 C.F.R. § 416.926a(a). An impairment is a “marked limitation” if it
 17 “interferes seriously with [a person's] ability to independently initiate, sustain, or
 18 complete activities.” 20 C.F.R. § 416.926a(e)(2)(i). By contrast, an “extreme
 19 limitation” is defined as a limitation that “interferes *very* seriously with [a person's]
 20 ability to independently initiate, sustain, or complete activities.” 20 C.F.R.
 § 416.926a(e)(3)(i) (emphasis added).

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ALJ'S FINDINGS

G.A.'s application for Title XVI Supplemental Security Income payments was filed on April 27, 2009, with an alleged disability onset date of April 1, 2007. Tr. 162-64. G.A. was eight years old on her alleged disability onset date. Id. G.A.'s applications were denied initially and upon reconsideration. Tr. 90-92, 94-96. She requested a hearing by an administrative law judge, Tr. 97, and on June 21, 2011, she appeared, accompanied by counsel and testified at a video hearing along with her mother. Tr. 55-87. The ALJ issued a decision on July 8, 2011, finding that G.A. was not disabled under the Act. Tr. 20-46.

At step one, the ALJ found that G.A. had not engaged in substantial gainful activity since April 27, 2009, the application date. Tr. 29. At step two, the ALJ found that G.A. had severe impairments, but at step three the ALJ found that G.A. did not have an impairment or combination of impairments that met or equaled a listed impairment. Tr. 29. Further, the ALJ found that G.A. did not have an impairment or combination of impairments that functionally equaled a listed impairment. Tr. 29-42.

G.A. requested review by the Appeals Council. Tr. 158-61. The Appeals Council denied review, making the ALJ's decision the Commissioner's final decision subject to judicial review. Tr. 1-8; 42 U.S.C. §§ 405(g), 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

ISSUES

G.A. raises two contentions for review: 1) whether the ALJ improperly rejected the opinions of her treating physician as well as her mother's testimony; and 2) whether the ALJ committed error in finding that the claimant's impairments did not functionally equal any Listing. ECF No. 23 at 7.

The Commissioner contends the final decision in this matter was supported with substantial evidence and it is free of any harmful legal error.

DISCUSSION

A. Discounting the Treating Physicians' Opinion and Mother's Testimony

G.A. contends that the ALJ's reasons for rejecting Dr. Liebe's opinion are erroneous assertions that do not constitute valid reasons for rejecting the opinion of a treating physician. ECF No. 23 at 12. G.A. contends the ALJ improperly rejected Dr. Leibe's opinion because it was without basis and was based on the mother's subjective complaints, and that her reports were exaggerated compared to the evidence in the record and could be influenced by sympathy. *Id.* at 9. She also contends that her mother's testimony was improperly rejected with a vague assertion that the mother was under tremendous stress which may have affected her ability to perceive her child's behavior. *Id.* at 13.

If the opinion of a treating or examining physician is uncontradicted, an ALJ may reject it only by offering "clear and convincing reasons that are supported by

1 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

2 On the other hand, in the case of a contradicted opinion, as we have here, “an ALJ

3 may reject the testimony of an examining, but non-treating physician, in favor of a

4 nonexamining, nontreating physician when he gives specific, legitimate reasons for

5 doing so, and those reasons are supported by substantial record evidence.” *Lester*

6 *v. Chater*, 81 F.3d 821, 831 (9th Cir. 2005) (*quoting Roberts v. Shalala*, 66 F.3d

7 179, 184 (9th Cir. 1995) (upholding ALJ's decision to reject examining

8 psychologist's functional assessment that conflicted with his own written report

9 and test results); *accord Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012). “The

10 ALJ can meet this burden by setting out a detailed and thorough summary of the

11 facts and conflicting clinical evidence, stating his interpretation thereof, and

12 making findings.” *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.

13 1989)(citation omitted). However, “[t]he opinion of a nonexamining physician

14 cannot by itself constitute substantial evidence that justifies the rejection of the

15 opinion of either an examining physician or a treating physician. *Lester*, 81 F.3d at

16 831 (other contradictory evidence includes laboratory reports, medical reports, and

17 claimant’s testimony). To the extent that an examining physician’s opinions are

18 based upon the claimant’s subjective complaints, the ALJ may cite the unreliable

19 nature of the claimant’s complaints as a reason for rejecting the examining

20 physician’s opinion. *See Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595,

1 602 (9th Cir. 1999) (“A physician’s opinion of disability [which is] premised to a
2 large extent upon the claimant’s own accounts of his symptoms and limitations
3 may be disregarded where those complaints have been properly discounted.”)
4 (internal quotations and citation omitted).

5 Here, the ALJ did not rely solely on the non-examining medical advisors’
6 opinions in discounting the treating doctor’s conclusions, but rather relied on an
7 abundance of other evidence, including medical records from treating doctors,
8 Yakima School District Special Education Services’ evaluations,
9 neurodevelopmental testing, an Occupational Therapy evaluation, a Speech-
10 Language Assessment (in both the Spanish and English language), teacher
11 questionnaires, school records, standardized school testing, the school
12 psychologist’s records, the claimant’s own testimony, and the mother’s testimony.

13 Tr. 31-37. After exhaustively evaluating all this evidence, the ALJ found:

14 As for the opinion evidence, the undersigned gives greater weight to
15 the opinion of the medical expert who has had an opportunity to
16 review all the evidence of record, including that received at the
17 hearing level. The undersigned gives weight to the opinions of the
18 claimant’s treating and examining physicians; however, the
19 undersigned does not accept Dr. Liebe’s conclusion that the claimant
20 has marked limitations in the domains of Acquiring and Using
Information and in Attending and Completing Tasks. These
conclusions are found to be without basis and appear to be based
mostly on the claimant's mother's subjective complaints and
symptoms, which the undersigned does not find corroborating with
the objective evidence of record. The undersigned notes the mother
clearly has other issues, which places a tremendous stress on her and
may affect her perception of the child’s behavior. The undersigned

1 does not doubt that the mother is trying to help her daughter; however,
2 based on the school reports, evaluations and questionnaires, the
3 child's behavior with her medical providers and observations at the
4 hearing, her reports are quite exaggerated. In addition, the possibility
5 always exists that she may be expressing an opinion, as the treating
6 physician, in an effort to assist the child, with whom she sympathizes
7 for one reason or another. Furthermore, the level of impairment she
8 opines is not supported by her own clinical picture. She fails to
9 indicate any observed behavior of the child that would show specific
10 ADHD symptoms. She also does not show any therapeutic benefit of
11 any of the ADHD drugs given to the child other than the mother's
12 subjective report. She even noted that the child seemed to be doing
13 better academically and has not had any academic regression beyond
14 what can be explained by the bilingual issue.

8 Tr. 37.

9 The Court determines that substantial evidence in the record supports the
10 ALJ's decision discounting Dr. Liebe's conclusion. Further, the Court determines
11 that substantial evidence supports the ALJ's decision discounting the mother's
12 "exaggerated" perceptions as inconsistent with the objective evidence in the
13 record. Despite claimant's contention to the contrary, lay opinion evidence can be
14 rejected without clear and convincing reason. *See Molina v. Astrue*, 674 F.3d
15 1104, 1114 (9th Cir. 2012)(competent lay witness testimony "cannot be
16 disregarded without comment" the ALJ "must give reasons that are germane to
17 each witness")(citations omitted).

18 While the Court recognizes that a district court cannot affirm the decision of
19 an agency on a ground it did not invoke in making its decision, *Pinto v. Massanari*,
20 249 F.3d 840, 848 (9th Cir. 2001), here the ALJ invoked the prerogative to recite

1 all the competing evidence in the record and make findings accordingly. *See*
2 *Magallanes v. Bowen*, 881 F.2d at 751. Accordingly, the Court rejects the
3 argument that counsel for the Commissioner strayed too far from the ALJ's
4 reasoning when citing to the underlying evidence of record incorporated by the
5 ALJ.

6 **B. Functional Equivalent to Listing**

7 G.A. contends the ALJ erred in ultimately concluding that she did not have
8 at least marked limitations in two domains: (1) acquiring and using information
9 and (2) attending and completing tasks.¹ ECF No. 23 at 15-20. Much of
10 claimant's argument is derivative of the argument rejected above that Dr. Liebe's
11 opinion should not have been discounted.

12 With respect to acquiring and using information, the ALJ recited the test for
13 this domain and gave examples of the functioning that would constitute marked or
14 extreme limitations. Tr. 37-38. Substantial evidence in the record supports the
15 ALJ's conclusion that claimant has less than marked limitations based on the
16 findings that:

17 The child's fifth grade teacher reported that she only has a slight
18 problem in this domain. The state agency psychologist found the

19 ¹ Unchallenged are the ALJ's findings that claimant has "no limitation" in the other
20 four domains.

1 child has a less than marked limitation in this domain. Dr. Moore
2 testified that the child has a less than marked impairment in this
domain.

3 Tr. 38 (citations omitted).

4 With respect to attending and completing tasks, the ALJ once again set forth
5 the test for this domain and gave examples of the functioning that would constitute
6 marked or extreme limitations. Tr. 38-39. The Court determines that substantial
7 evidence in the record supports the ALJ's conclusion that claimant has less than
8 marked limitation based on the findings that:

9 The child's fifth grade teacher reported she has no problems in this
10 domain. School records in December 2010 show the child has made
11 progress in reading, math, writing skills since her last evaluation for
12 special education services and she has closed the achievement gap
13 between her and same aged peers in all academic areas without
receiving specially designed instruction. The state agency
psychologist found the child has a less than marked limitation in this
domain. Dr. Moore testified that the child has a less than marked
impairment in this domain.

14 Tr. 39 (citations omitted).

15 Claimant recites a plethora of facts to support her position. However, a
16 district court may not substitute its judgment for that of the Commissioner. If the
17 evidence "is susceptible to more than one rational interpretation, [the court] must
18 uphold the ALJ's findings if they are supported by inferences reasonably drawn
19 from the record." *Molina*, 674 F.3d at 1111.

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1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, ECF No. 22, is **DENIED**.

3 2. Defendant's Motion for Summary Judgment, ECF No. 26, is

4 **GRANTED.**

5 3. The hearing set for March 31, 2014, is **VACATED**.

6 The District Court Executive is hereby directed to file this Order, enter
7 Judgment accordingly, furnish copies to counsel, and **CLOSE** this file.

8 **DATED** this 2nd day of August, 2013.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge